88-935

Supreme Court, U.S.
FILED
NOV 21 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEWIS B. SCKOLNICK,

PETITIONER,

v.

Terry Wells,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

LEWIS B. SCKOLNICK
PRO SE
511 LONG PLAIN ROAD
LEVERETT MA 01054
NO TELEPHONE

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55 pp

PREFIX

1. Whether relief under 11 U.S.C. 362(d)(1) for "cause" was properly granted when the owner sought repossession of the residence of the Debtor and the purpose of the Chapter 13 petition was to preserve Debtor's equity in said residence.

2. Whether confirmation of the Chapter 13 Plan was properly denied where Debtor established the existence of an implied contract to purchase the residence, based upon well-settled principles of State law, and Debtor proposed to pay the purchase price prior to the termination of a 3-year, 100% payment, Chapter 13 Plan.

3. Whether attorney fees were properly denied under 11 U.S.C. 362(h) where

owner's counsel, with full knowledge of the stay and without seeking relief therefrom, called the clerk of the State court and appeared in State court and argued to restore owner's eviction case to the State court calendar.

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STATUTES

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OPINION BELOW

The Court of Appeals entered its order affirming the finding of the district court on August 24, 1988. A copy of the order is attached at RA1-RA3.

The petitioner did not file a petition for rehearing *en banc*.

JURISDICTION

On August 24, 1988 the Court of Appeals entered its order affirming the district court's orders of May 19 and October 30, 1987. The jurisdiction of this Court is under 28 U.S.C. 1254(1). The statutes relied upon: 11 U.S.C. 362(d),365(b)(1),502(b) and 1325 are set out in full beginning on page five of the Statement of the Case.

CONSTITUTIONAL PROVISION INVOLVED

None.

STATEMENT OF THE CASE

Debtor filed a Chapter 13 Plan on December 10, 1985 following his filing of his Chapter 13 Petition on November 25, 1985 so as to preserve his equity in his residence and avoid homelessness. On September 22, 1988 in a seperate act a cottage owned by Debtor's mother was

burned to the ground. At the time of filing his Chapter 13 petition, Debtor's principal source of income was Social Security disability payments.

Respondent, the owner of the residence, had previously obtained a judgement for possession from the State district court on November 21, 1985 but no warrant had issued at the time of filing the Chapter 13 petition. The Debtor appealed that finding to the State superior court which found for Respondent in a non jury trial on October 1, 1987. On October 2, 1987 the State superior court denied Debtor's motion to waive appeal bond, transcript fees and expenses. On October 1, 1987 the Debtor appealed to the State appeals court. On October 3, 1987 a notice for possession was served upon the Debtor

even though a notice of appeal had been filed. On October 26, 1987 a hearing was had before a single justice of the State appeals court regarding the matters of waiving the appeal bond, transcript fees and expenses. The single justice denied the Debtor's motion and sent the parties back to the State superior court. At this hearing the counsel for the Respondent told the single justice and the Debtor's counsel that he would arrange for the hearing before the State justice. Since that date no further action has been taken. Debtor still resides in the residence and has paid $2,474.20 to the Chapter 13 Trustee, at the rate of $100 per month, pursuant to the First Modified Chapter 13 Plan, although said plan has not yet been confirmed by the courts below.

Said plan will terminate at the end of three years on November 25, 1988 and Debtor proposes to pay the purchase price of $32,000 plus taxes for the residence, with interest at the legal rate, prior to that date. He stands ready and willing to do so, based upon financial backing by his family.

On September 22, 1986, Respondent was granted relief by the Bankruptcy Court for "cause" under 11 U.S.C. 362(d)(1) but the eviction of Debtor has been stayed on appeal after the de novo trial in State Court of the issue of Respondent's right to possession.

On February 17, 1987, the Bankruptcy Court denied confirmation of Debtor's First Modified Chapter 13 Plan based upon Respondent's objection thereto.

Debtor's appeals in the District

Court were consolidated and on October 30, 1987, the District Court affirmed the Bankruptcy Court.

At the time of granting relief from the stay, the Bankruptcy Court denied Debtor counsel fees pursuant to 11 U.S.C. 362(h) but the District Court did not expressly rule on this issue.

STATUTES INVOLVED

Statutory provisions involved, in pertinent part, read as follows:

Section 362(d):

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying or conditioning such stay-
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property under subsection (a) of this section, if-

(A) the debtor does not have equity in such property; and
(B) such property is not necessary to an effective reorganization

Section 365 (b) (1):

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee-

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
(B) compansates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
(C) provides adequate assurance of future performance under such contract or lease.

Section 502 (b):

(b) ***, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim ***.

Section 1325. Confirmation of plan

(a) Except as provided in subsection (b), the court shall confirm a plan if-

(1) the plan complies with the provisions of this chapter and with other applicable provisions of this title;

***

(3) the plan has been proposed in good faith and not by any means forbidden by law;

(4) the value, as of the effective date of the plan, of property to be distributed under the plan on account of each allowed unsecured claim is not less than the amount that would be paid on such claim if the estate of the debtor were liquidated under Chapter 7 of this title on such date;

***

(6) the debtor will be able to make all payments under the plan and to comply with the plan.

(b)(1) If the trustee pr the holder of an allowed unsecured claim objects to the confirmation of the plan, then the court may not approve the plan unless, as of the effective date of the plan-

(A) the value of the property to be distributed under the plan on account of such claim is not less than the amount of such claim; or

(B) the plan provides that all of the debtor's projected disposable income to be received in the three-year period beginning on the date that the first payment is due under the plan will be applied to make payment under the plan.

(2) For purposes of this subsection, "disposable income" means income which is received by the debtor and which is not reasonably necessary to be expended-

(A) for the maintanence or support of the debtor ***.

Debtor's Chapter 13 Petition, dated November 25, 1985, showed monthly Social Security income of $439.39 and $200 per month from sales of books, poems and book reviews, for a total of $639.39. The petition stated that Debtor was occupied in establishing his economic independence from Social Security by means of writing, publishing and real estate investment.

Unable to afford prevailing rentals,

Debtor sought to invest labor and materials and to dwell in substandard housing for the purpose of acquisition during or after improvement of said housing. The Chapter 13 petition referred to the Debtor's residence, 511 Long Plain Road, Leverett, MA, as one in which he had invested labor and materials and had a contract to purchase. Debtor's Chapter 13 Plan proposed 100% payment in one year, including payment of the contract price of $32,000 to Respondent from the proceeds of a Bay Bank mortgage. However, Respondent would not accept that amount and the Chapter 13 Proceeding adversely affected Debtor's mortgage application. Debtor's First Modified Chapter 13 Plan was submitted after payment in full of all the creditors <u>other than</u> Respondent and

assumed the executory contract of sale for the residence as well as the unexpired lease of $1 per year while Debtor dwelled there and made it habitable.

Respondent served a purported Proof of Claim, dated May 2, 1986, without any supporting documentation, in the untemized amount of $10,000, on the patently false basis that he had been refused access to the house and was therefore unable to make an inspection. On advice of counsel, Debtor had delivered a key and letter of authorization to Respondent's counsel on December 2, 1985 and these facts were known to Respondent before he signed the proof of claim. The Bankruptcy Court declined to rule on Debtor's objection that the claim was false

and never scheduled any hearing on said claim. Later, the Bankruptcy Court noted that Debtor "objects" to the claim but nevertheless entertained Respondent's objection to confirmation although the claim had never been allowed. In said objection to confirmation, Respondent claimed there was not a "written" or "oral" contract of sale for the residence and there is no "existing" lease.

Debtor asserted in Bankruptcy Court and in District Court that there was a series of representations by telephone and continuing conduct amounting to a representation on the part of Respondent, for more than one year, on which Debtor relied, and acted upon, in rehabilitating the house, and that due to a rising real estate market, Debtor would suffer severe detriment if the implied contract

established by said facts was not recognized by the court and permitted to be assumed under the Plan.

The house was purchased by the Respondent for $5,000 in the late 1960's. Prior to a house fire in the early 1980's, Respondent had tenants in the premises since the 1960's. In the spring of 1984, based on its value at that time, Respondent offered to sell the premises to Debtor for $32,000. In the spring of 1985, Respondent continued to hold to the price, although the real estate prices had risen. In December, 1985, based on a professional appraisal, Debtor listed the market value of the house at $55,000 in his Plan. At the time of the Bankruptcy Court hearing on Respondent's application for relief from the Sec. 362 stay, Respondent's professional appraisal

indicated the market value at $66,000. Thus, on the date of said hearing, September 22, 1986, Respondent was oversecured in an amount approximately equal to more than twice the selling price he had offered to Debtor in 1984 and 1985. At said hearing, Respondent's counsel "waived" Sec. 362(d)(2), conceding the Debtor had equity in the premises, as he had done at the State district court on November 21, 1985, and relied solely on "cause" for relief from the stay pursuant to Sec. 362(d)(1) of the 1978 Bankruptcy Code.

Throughout the proceedings, and in the testimony on September 22, 1986 and February 10, 1987, Respondent steadfastly maintained that Debtor had always rejected his offers to sell to Debtor at $32,000 and that therefore there was no

oral contract. Debtor contradicted that testimony. He stated in his Plan that he had a contract for $32,000 and a mortgage "commitment" for $31,000 from Bay Bank. He further stated that he "agreed to the price" of $32,000 in his Statement of January 12, 1986 and his affidavit of June 2, 1986, which relates to the actions he took in reliance on said agreement.

In his affidavit, sworn to on June 4, 1986, Debtor described an agent sent by Respondent to inspect the work Debtor was doing on the house. The agent, Paul Stenbock, told Debtor he knew Debtor would be purchasing the house. Debtor later testified to the same facts. Respondent testified that he had, indeed, sent a Paul Stenbock to visit Debtor at the house and report back to him.

Debtor stated and later testified

that after he had a binding oral agreement to purchase the house from Respondent for $32,000, he attempted to negotiate a reduction in price due to structural defects in the floors and roof disclosed by an inspection by a carpenter (to which the Respondent agreed) but failed. Debtor testified that the original agreement remained in effect during his attempt to negotiate a reduction. Respondent always steadfastly denied the existence of any oral contract, in 1984 or 1985, but testified he was willing to sell the house based upon a "reasonable evaluation" at that time and intended to tell Debtor the premises at that time were "worth a lot more than he had".

Prior to moving in and expending a year of labor on the house, grounds and

shed, Debtor wrote to Respondent on July 25, 1984, as follows:

> "Please find enclosed a check for $1.00 as per our agreement of July, 1984. This check represents one years rent on your property at 511 Long Plain Road Leverett. I hope to hear from you soon about coming up here and meeting with me about the sale of your house."

Respondent negotiated the check in September, 1984 and Debtor began to occupy the house on November 15, 1984. Debtor discussed by telephone his intention of acquiring the house unrepaired and doing the repairs himself. Respondent was aware that Debtor was making repairs to the house while living there from the fall of 1984 to the fall of 1985. Internally, he objected but never espressed these objections to the Debtor and never advised him he had no contract to purchase and Debtor, in

reliance on said representations and conduct of Respondent, put the house in habitable condition.

REASONS FOR GRANTING THE WRIT

POINT I

RELIEF UNDER 11 U.S.C. 362(d)(1) FOR "CAUSE" WAS IMPROPERLY GRANTED WHEN THE OWNER SOUGHT REPOSSESSION OF THE RESIDENCE OF DEBTOR AND THE PURPOSE OF THE CHAPTER 13 PETITION AND PLAN WAS TO PRESERVE DEBTOR'S EQUITY IN SAID RESIDENCE.

The question as to whether relief under 11 U.S.C. 362(d)(1) for cause could be granted to an owner seeking to repossess property was resolved by this Court. That dispute as to statutory

interpretation was found in favor of debtors on January 20, 1988 by this Court in United Savings v. Timbers of Inwood Forest, U.S. , 98 L.Ed2d 740. Accordingly, this point should be resolved in favor of Debtor by this Court or remanded to the courts below.

There is no reason for a remand. Respondent conceded the Debtor's equity under 11 U.S.C. 362(d)(2) and the chief purpose of the Chapter 13 petition and plan was acknowledged by both sides to be preservation of Debtor's residence. See Grundy National Bank v. Stiltner, 58 B.R. 593 (USDC, WD Va, 1986), which holds that there is an irrebuttable presumption in a Chapter 13 case that the debtor's home is necessary to effective reorganization where debtor's primary purpose in filing a Chapter 13 petition

is to save his home.

POINT II

CONFIRMATION OF THE CHAPTER 13 PLAN WAS IMPROPERLY DENIED WHERE DEBTOR ESTABLISHED THE EXISTENCE OF AN IMPLIED CONTRACT TO PURCHASE THE RESIDENCE, BASED UPON WELL-SETTLED PRINCIPLES OF STATE LAW, AND DEBTOR PROPOSED TO PAY THE PURCHASE PRICE PRIOR TO THE TERMINATION OF A 3-YEAR, 100% PAYMENT PLAN.

In 1985, the United States Court of Appeals for the First Circuit held that the priciples of implied contract were well settled in Massachusetts in Goeken v. Kay 751 F2d 469, 472, 474 and Debtor relied on that court's decision in that

case in the record below.

The opinions of the courts below contained in the record show beyond question that the well-settled principles of implied contract recognized by the First Circuit, and argued by Debtor, were neither articulated nor applied in the opinions of the courts in the case at bar. Accordingly, this Court should resolve this point also in favor of Debtor if the record is considered adequate, or should remand.

Again, as in Point I, there is no reason for a remand. The Statement of the Case plainly show by undisputed facts the existence of representations by Respondent and conduct amounting to a representation as well as reliance by Debtor and severe detriment to him financially and psychologically if the

implied contract to purchase his home is not given its deserved recognition. As noted by the First Circuit in its decision in Goeken, supra, when a promise is enforceable in whole or in part by virtue of reliance, it is a "contract" under Massachusetts law and it is enforceable pursuant to "traditional contract theory", citing Loranger Construction Corp. v. E.F. Hausermann Co., 6 Mass. App. 152, 159, 374 N.E. 2d 306, aff'd 376 Mass. 757, 761, 384 N.E. 2d 176 (Braucher, J., 1978).

Confirmation of the plan was and is appropriate because it is now well recognized that 11 U.S.C. 365(b)(1) and 1325 may be used by the disadvantaged to cure defaults and assume executory contracts and leases necessary for their rehabilitation, especially with respect

to their homes. See Re Tally, 69 B.R. 219 (USDC, MD Tenn., 1986). To the extent there was a default in exceeding a reasonable time to close title on the implied contract in the case at bar, this default was subject to being cured with respect to residential property under Section 365(b)(1). Id.

However, there was no default. Respondent's conduct in repudiating his obligation to Debto and his wrongful eviction proceeding forced the Chapter 13 petition and interfered with the Debtor's ability to obtain his pre-qualified mortgage with Bay Bank. Debtor was also current in tendering his rent payments of $1 per year and has been paying $100 per month as his "disposable" income to the Chapter 13 Trustee for the purpose of covering any

costs he is not paying himself with respect to his home pending realization of the plan, all pursuant to the 1984 ammendments to Section 365(a)(1). The house was clearly not in rentable condition intil Debtor made it habitable once more.

Debtor's claim to implied contract is made in good faith and is supported by well-settled state law. Contrary to the statement in the Bankruptcy Court opinion, there had not been any prior adjudication of the implied contract claim in the state courts and when the Bankruptcy Court decided not to abstain, its own adjudication of that claim became the first such adjudication. The theory of implied contract was consistently urged by Debtor's counsel. Debtor and Respondent had both acted without benefit of

counsel in dealing with each other with respect to the real property involved from the spring of 1984 to the fall of 1985 and a typical case of implied contract was presented by the facts but not addressed by either the Bankruptcy Court, the District Court or the Court of Appeals in their respective opinions (RA1-RA16).

Since the plan is, and always was, a 100% payment plan, it complies with both Sections 365(A)(1) and 1325(a)(4) and (b)(1).

The Debtor has consistently made the payments required by the original and first modified plans and is able to close on the implied contract to purchase at $32,000 at once due to financial backing from his family.

Under these circumstances, the plan

is required by law to be confirmed and this Court should confirm the plan on this appeal because the record is fully adequate for that result.

POINT III

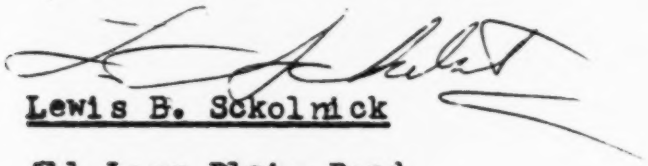
ATTORNEY FEES WERE IMPROPERLY DENIED UNDER 11 U.S.C. 362(h) WHERE OWNER'S COUNSEL, WITH FULL KNOWLEDGE OF THE STAY AND WITHOUT SEEKING RELIEF THEREFROM, CALLED THE CLERK OF THE STATE COURT AND APPEARED IN STATE COURT TO ARGUE FOR RESTORATION OF THE OWNER'S EVICTION CASE TO THE STATE COURT CALENDAR.

The facts stated in the point head are not in dispute and clearly

warrant an award of attorney fees as requested and as mandated by 11 U.S.C. 362(h).

For the foregoing reasons petitioner Lewis B. Sckolnick respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,



Lewis B. Sckolnick
511 Long Plain Road
Leverett Ma 01054-9740
No Telephone
November 18, 1988

RECORD APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 87 2122

IN RE:

LEWIS B. SCKOLNICK,

Debtor,

LEWIS B. SCKOLNICK,

Appellant.

Before

Coffin, Bownes and Selya,

Circuit Judges.

ORDER OF COURT

Entered August 24, 1988

Because appellant has failed to raise a substantial question on appeal, we summarily affirm the district court's

RAL

order of October 30, 1987, affirming the bankruptcy court's decision to deny confirmation of debtor-appellant's Chapter 13 plan, substantially for the reasons set forth therein. As part of his appeal before this court, appellant has questioned the district court's May 16, 1987 order affirming the bankruptcy court's decision to grant appellee Weil's request that the automatic stay provisions be lifted for cause pursuant to 11 U.S. Sec. 362(d)(2). It appears that this court may not have jurisdiction to consider the appeal from this order; however, assuming without deciding that jurisdiction exists, we agree with the district court's determination that the bankruptcy court correctly granted relief from ths stay. Finally, with respect to appellant's

request that attorney's fees be awarded under 11 U.S.C. Sec. 362(h), this section is inapplicable to the case at hand, which does not involve a showing of a willful violation of the automatic stay provisions by any party.

The appeal is hereby dismissed. Loc. R. 27.1.

By the Court:

Francis P. Scigliano

Clerk.

(cc: Messrs: Sokolnick, Washburn and Carlsen)

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

IN THE MATTER OF	)
	) CIVIL ACTION NOS.
LEWIS B. SCKOLNICK,	)
	) 86-0240 F and
Debtor/Appellant	)
	) 87 0049 F
	)
	) (Consolidated)

MEMORANDUM AND ORDER

October 30, 1987

FREEDMAN, C.J.

Appellant Lewis Sckolnick brings this action under 28 U.S.C. Sec. 158(a), appealing the order of United States Bankruptcy Court Judge James F. Queenan which denied confirmation of Sckolnick's First Modified Chapter 13 plan for bankruptcy. Under the plan, Sckolnick proposed the assumption, pursuant to 11 U.S.C. Sec. 365, of an alleged executory contract to buy the premises

at 511 Long Plain Road, Leverett, Massachusetts, from the purported seller, appellee Terry Wells. The bankruptcy judge denied confirmation of the plan under 11 U.S.C. Sec. 1325 for the following reasons: (1) there was no purchase and sale agreement in existence for Sckolnick to assume; (2) the plan called for payments over a period longer than three years; and (3) Sckolnick's conduct concerning the alleged contract was inequitable.

On appeal, Sckolnick presents two arguments contesting the order of the bankruptcy judge. First, Sckolnick contends that an implied contract did exist between Sckolnick and Wells for the sale of the premises in question. According to Sckolnick, an implied contract was established when, pursuant

to an oral, executory contract, he took physical possession of, and made substantial improvements on, the premises in question. Second, Sckolnick maintains that the bankruptcy judge erred in allowing Wells to "deny acceptance" of the plan pursuant to 11 U.S.C. Sec. 1325 (a)(5)(A) Because Wells does not have an "allowed secured claim" as required by the statute.

The scope of this Court's review is set forth in Bankruptcy Rule 8013 which states that the findings of fact of the bankruptcy court "shall not be set aside unless clearly erroneous." Bankruptcy Rule 8013. A factual finding is clearly erroneous when a reviewing court is left with the definite and firm conviction that a mistake has been made. See In re Coughlin, 27 B.R. 632,635 (1st Cir.

B.A.P. 1983)(quoting United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948). Using this standard, this Court concludes upon a careful review of the record that the bankruptcy court's findings are not clearly erroneous.

The record presents no facts controverting the bankruptcy judge's finding that no agreement, oral or written, was reached between the parties for the purchase and sale of the Leverett premises. Although Sckolnick points to Wells' statement, "I was willing at that time to arrange a contract with him (Sckolnick) and I stated that to him," as establishing an implied contract, it is clear from this statement and others in the record that only preliminary discussions took place.

Sckolnick's second argument, that Wells did not have the "right to deny acceptance" to the plan because it is a "right granted in law only to secured creditors" is also without merit. Wells, as a "party in interest," is entitled under 11 U.S.C. Sec. 1324 to object to confirmation of the plan. 11 U.S.C. Sec. 1324.

This Court concludes that the bankruptcy judge's findings are not clearly erroneous. Thus, this Court AFFIRMS the bankruptcy court.

It is so Ordered.

Frank H. Freedman
Chief United States
District Judge

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

IN THE MATTER OF	)
	) CIVIL ACTION NOS.
LEWIS B. SCKOLNICK,	)
	) 86 0240 F and
Debtor/Appellant	)
	) 87 0049 F
	)
	) (Consolidated)

ORDER

May 19,, 1987

FREEDMAN, C.J.

This matter is presently before the Court upon appeal from the Order of the Bankruptcy Court allowing the motion of Terry H. Wells for relief from the automatic stay provided by 11 U.S.C. Sec. 362. The Court has varefully reviewed the entire record below and the briefs submitted by the parties. The Court finds that the Bankruptcy Court's

decision to lift the stay pursuant to 11 U.S.C. Sec. 362(d)(1) was fully justified.

The Order of the Bankruptcy Court lifting the stay is hereby AFFIRMED.

It is So Ordered.

Frank H. Freedman

Chief United States District Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF MASSACHUSETTS

In re	)	
	)	Chapter 13
LEWIS SCKOLNICK,	)	
	)	Case No. 85 40487 G
Debtor	)	

FINDINGS, RULINGS AND ORDER

DENYING CONFIRMATION

OF CHAPTER 13 PLAN

Lewis Sckolnick (the "Debtor") moves for confirmation of the Debtor's First Modified Chapter 13 Plan. Under the Debtor's original plan, a 100% payment was proposed for all creditors except Terry H. Wells ("Wells"), to whose claim the Debtor objects. These payments have been completed. The Debtor's First Modified Plan (the "Plan"), now before the

RAll

Court proposes assumption by the Debtor of two executory contracts allegedly entered into between him and Wells: (1) An oral agreement between Wells as seller and the Debtor as buyer for the sale of the premises at 511 Long Plain Road, Leverett, Massachusetts, at a price of $32,000; and (2) an oral lease between Wells as lessor and the Debtor as lessee for these same premises, at a rental of $1 per year, for a term which will end when the sale is completed.

Wells has filed an objection to the Plan on the grounds that the Plan is for more than three years, and on the further grounds that no such oral purchase and sale agreements exists and no such oral lease exists. Eviction litigation is now in process in the state courts. Apparently because of this, both parties have

requested that the Court refrain from ruling on the question of the existence of a lease. The Court conducted a hearing on confirmation on February 10, 1987, and heard evidence on the existence of the purchase and sale agreement for the purpose of determining whether the plan can be confirmed as proposed. This opinion contains the Court's findings, rulings and order on the matter.

The Court finds and rules that no agreement, oral or written, was ever made by the parties for the purchase and sale of the Leverett premises. I find completely uncredible the Debtor's testimony that the parties came to such an agreement over the telephone. At most, Wells said at one point that he was willing to consider a sale at some price. He thereafter resisted all further

discussions with the Debtor and refused to come to Massachusetts from New York to meet with the Debtor. Consistent with this finding that only preliminary discussions took place are the facts that: (1) the Debtor thereafter obtained an appraisal of the house; and (2) the Debtor forwarded to Wells a proposed written agreement calling for a price of $20,000, not the $32,000 now conceded to be the alleged purchase price.

Confirmation of the Plan is denied for the reason that there is no purchase and sale agreement in existence for the Debtor to assume. It also seems highly unlikely to this Court that any such oral lease at $1 per year is in existence, but because of the parties' request that no lease determination be made, the Court will not rule on this aspect.

Confirmation is also denied for the reason that the Plan proposes payments at $100 per month against the alleged $32,000 purchase price, which calls for payments over a period of longer than three years.

The Court also declines to confirm the Debtor's plan because it finds the Debtor's conduct concerning this alleged contract inequitable. The Debtor has continued to press for the recognition of a contract for the sale of Wells's property to him despite a glaring lack of foundation in law and despite several adverse determinations in both this Court and the state courts. The Court considers the Debtor's use of Chapter 13 as an attempt to frustrate the rights of Wells and an abuse of this Court.

SO ORDERED.

At Worcester this 17th day of February, 1987.

James F. Queenan, Jr.

James F. Queenan, Jr.

U.S. Bankruptcy Judge

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

LEWIS B. SCKOLNICK,

PETITIONER,

v.

TERRY WELLS,

RESPONDENT.

PROOF OF SERVICE

COMMONWEALTH OF MASSACHUSETTS)
) ss.:
COUNTY OF FRANKLIN)

LEWIS B. SCKOLNICK, after being duly sworn, deposes and says that pursuant to Rule 28.3 of this Court he served the within PETITION FOR WRIT OF CERTIORARI TO

THE COURT OF APPEALS FOR THE FIRST CIRCUIT on counsel for the Respondent by enclosing a copy thereof in an envelope, first class postage prepaid, addressed to:

Robert B. Carlsen, Esq.
40 School Street
Suite 12
Greenfield Ma 01301

and depositing same in the United States mails at Amherst, Massachusetts, on 21 November 1988.

Lewis B. Sckolnick, Affiant

Subscribed and Sworn to Before Me this 21 Day of November 1988.

Notary Public In and For
Said County and State

Commission expires March 22 1992
Franklin County